EXHIBIT A

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAEL BOSWELL, Plaintiff, v. STEVE EOON, KIRSTEN BYRNES, CHRISTINA EICKMAN, PTL. JAMES FEISTER, NEW BRUNSWICK POLICE DEPARTMENT, CITY OF NEW BRUNSWICK, and JOHN DOES (#1-5) Defendants.	)	Civil Action No. 08-5098 (GEB) **MEMORANDUM OPINION**

BROWN, Chief Judge

This matter comes before the Court upon the motion for summary judgment filed by Defendants the City of New Brunswick and Patrolman James Feaster ("Feaster"), a New Brunswick Police officer (collectively "Defendants")[1]. (Doc. No. 22.) Plaintiff Michael Boswell ("Boswell") opposes the present motion. (Doc. No. 35.) The Court has considered the parties' submissions and decided the matter without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons that follow, the Court will grant Defendants' present motion for summary judgment and close this case.

I. BACKGROUND

A. Facts

[1]Patrolman James Feaster was incorrectly named in the complaint as James Feister.

The following facts are undisputed unless otherwise noted. On the night of September 4, 2005, Officer Feaster entered New Brunswick's Boyd Park (the "park") in his patrol car and drove through the park along a paved road. (Pl.'s 56.1 Stmt. at ¶¶ 12, 14; Doc. No. 35; Defs.' 51.6 Stmt. at ¶¶ 12, 14; Doc. No.28.) Officer Feaster saw a figure sitting on a picnic table, and in response, activated his spotlight and approached the table. (*Id.* at ¶ 17.) Officer Feaster walked up to the individual sitting at the table and asked him for identification. (*Id.* at ¶ 19.) The individual, Plaintiff Michael Boswell, presented an identification card that provided Boswell's name, Boswell's address of 5 Elm Row, New Brunswick, and a social security number. (*Id.* at ¶¶ 22, 23) Officer Feaster then ran a warrant check on Boswell. (*Id.* at ¶ 25.) After the warrant check came back negative, Officer Feaster issued and handed a summons to Boswell for being in the park after hours in violation of City Ordinance 12:28:010. (*Id.* at ¶ 26.) Officer Feaster then told Boswell that he had to leave the park. (*Id.* at ¶ 27.) Thereafter, Boswell started to go toward the canal that bordered the park on one side. In response, Officer Feaster again told Boswell he would have to leave the park and directed him toward an egress point at Commercial Avenue. (*Id.* at ¶¶ 29, 31, 32.) As Boswell walked away, Officer Feaster observed Boswell rip up the ticket he had been given. (*Id.* at ¶ 37.) After Boswell walked away, Officer Feaster saw an empty quart bottle of alcohol under the bench where Boswell was sitting. (*Id.* at ¶ 34.) Officer Feaster had not observed Boswell drinking from the bottle, but believed that he had been drinking from it. As a result, Officer Feaster wrote Boswell a ticket for having an open container of beer in the park. (*Id.* at ¶ 39.)

Some time later, Officer Feaster heard a radio dispatch advising him of an accident at the intersection of Route 18 and Commercial Avenue. (*Id.* at ¶ 46.) When he arrived at the scene there were two vehicles in the intersection and a person who was identified as Boswell under one of the cars. (*Id.* at ¶ 48.) Boswell was taken to Robert Wood Johnson University Hospital after the accident where he was found to have a blood alcohol concentration of .24%. (*Id.* at ¶ 56.)

At all times during Officer Feaster and Boswell's interaction, Boswell appeared to understand and was cooperative with Officer Feaster. (*Id.* at ¶ 42.) Boswell responded immediately and appropriately to all commands and his speech was clear and coherent. (*Id.*) Officer Feaster was standing five feet from Boswell when he gave him the summons. (*Id.* at ¶ 27.) His physical coordination was controlled and balanced, and Officer Feaster did not detect any odor of alcohol. (*Id.*) Officer Feaster did not observe Boswell having any difficulty walking. (*Id.* at ¶ 41.) Based on his training and experience Officer Feaster made sufficient observations of Boswell and determined he was not intoxicated. Officer Feaster chose not to arrest Boswell because he had identification, did not appear incapacitated by alcohol and was not a danger to himself or others. (*Id.* at ¶ 45.)

II. DISCUSSION

Defendants argue that they are entitled to a judgment as a matter of law because: (1) Boswell cannot substantiate all elements of the state created danger theory of liability under 43 U.S.C. § 1983 (Pl.'s Br. 24; Doc. No. 28.); (2) Officer Feaster's actions are protected by qualified immunity (*Id.* at 35); (3) Boswell cannot establish the elements of a *Monell* claim (*Id.* at 17); and (4) the New Brunswick Police Department is not a proper defendant because it is not an entity separate from the municipality (*Id.* at 16).

A. Standard of Review

A party seeking summary judgment must "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Hersh v. Allen Prods. Co., Inc.*, 789 F.2d 230, 232 (3d Cir. 1986). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (noting that no issue for trial exists unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict in its favor). In deciding whether triable issues of fact exist, the court must view the underlying facts and draw all reasonable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Pa. Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995); *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 231 (3d Cir. 1987).

B. Application

1. The State Created Danger Theory of Liability Under 42 U.S.C. § 1983

First, Defendants argue that summary judgment should be granted because Boswell cannot substantiate all elements of the state created danger theory of liability under 42 U.S.C. § 1983. "[T]o establish a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate a violation of a right secured by the Constitution and the laws of the United States and that the alleged deprivation was committed by a person acting under color of state law." *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141 (3d Cir. 1995) (quoting *Moore v. Tartler*, 986 F.2d 682, 685 (3d Cir. 1993)). The Due Process Clause alone does not generally impose an affirmative duty to protect a citizen who is not in state custody. *Bright v. Westmoreland County*, 443 F.3d 276, 281 (3d Cir. 2006) (citing *DeShaney v. Winnebago Cty. Soc. Servs. Dep't*, 489 U.S. 189, 201 (1989)).

However, "when the harm incurred is a direct result of state action, liability can attach under § 1983" using the state created danger theory. *Ye v. United States*, 484 F.3d 634, 637 (3d Cir. 2007) (citing *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996)). A state created danger claim requires: (1) the harm ultimately caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all. *Ye*, 484 F.3d at 638.

In this case, the Court agrees with the Defendants that Boswell cannot establish at least the second element noted above as a matter of law, and therefore, summary judgment for Defendants on Boswell's § 1983 claim will be granted. As noted, the second element of the state created danger doctrine analysis requires that a state actor acted with a degree of culpability that shocks the conscience. *Patrick v. Great Valley Sch. Dist.*, 296 Fed. Appx. 258, 261 (3d Cir. 2008). In situations such as this case, where the state actor has ample time for deliberation before engaging in the allegedly unconstitutional conduct, "deliberate indifference" is sufficient to support culpability. *Patrick v. Great Valley Sch. Dist.*, 296 Fed. Appx. 258, 261 (3d Cir. 2008) (citing *Phillips v. County of Allegheny*, 515 F.3d 224, 240 (3d Cir. 2008)). Deliberate indifference requires more than negligence. *County of Sacramento*, 523 U.S. 833, 849 (1998). It is equivalent to recklessly disregarding a known risk of harm. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

Here, the undisputed facts make clear that no reasonable factfinder could conclude that Officer Feaster's actions meet the standard of deliberate indifference. It is undisputed that on September 4, 2005, Officer Feaster encountered Boswell in the park after dark, issued him a summons, and instructed him to leave the park. (Pl.'s 51.6 ¶¶ 12, 26, 28; Doc. No. 35; Defs.' 51.6 ¶¶ 12, 26, 28) At the time, Officer Feaster observed Boswell to be cooperative, responsive, and controlled. (Pl.'s 56.1 ¶ 42; Doc. No. 35; Def. 51.6 ¶ 42; Doc. No. 28.) Based on his training and experience, Officer Feaster determined that Mr. Boswell was not intoxicated. (Plf.'s 56.1 ¶ 43; Def. 51.6 ¶ 43.) Because both parties agree that Officer Feaster did not know Boswell was intoxicated when he directed him to leave the park, Officer Feaster did not know of and disregard a risk to Boswell's safety. Notably, this is not a situation like *Kneipp*, where the plaintiff provided evidence that the police officers knew Kneipp was intoxicated and incapacitated, but allowed the plaintiff to walk home alone. 95 F.3d at1208-09. Rather, in this case, Officer Feaster was unaware of Mr. Boswell's intoxicated state, and as a result, the Court concludes that no reasonable factfinder could decide that by asking Mr. Boswell to leave the park, Officer Feaster acted with a degree of culpability which shocks the conscience. Therefore, because Boswell cannot satisfy at least the second requisite element of the state created danger doctrine as a matter of law, Boswell's claim under 42 U.S.C. § 1983 fails.

2. Qualified Immunity

Defendants also move for summary judgment on Boswell's § 1983 claim on the ground that Officer Feaster's actions are protected by the doctrine of qualified immunity. The Court agrees, and concludes that the doctrine of qualified immunity also defeats Boswell's § 1983 as a matter of law. "Qualified immunity shields government officials from liability for civil damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Dancy v. Collier*, No. 07-4329, 266 Fed. Appx. 102, 2008 U.S. App. LEXIS 3693, at *5 (3d Cir. Feb. 20, 2008), quoting *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "The inquiry into the applicability of qualified immunity is twofold: (1) whether the plaintiff demonstrated the deprivation of a constitutional right, and (2) whether that right was established at the time of the alleged deprivation." *Dancy*, at *5, citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). "This immunity is broad in scope and protects all but the plainly incompetent or those who knowingly violate the law." *Curley v. Klem*, 499 F.3d 199, 206 (3d Cir. 2007), quoting *Couden v. Duffy*, 446 F.3d 483, 501 (3d Cir. 2006) (Weis, J. dissenting).

The Court first addresses the first part of the qualified immunity analysis. Here, Boswell alleges that Officer Feaster violated Boswell's right to substantive due process under the Fourteenth Amendment, including Boswell's alleged liberty interest in his personal security. (Pl.'s Compl. at 4; Doc. No.) Defendants argue Boswell cannot demonstrate Officer Feaster actually violated a constitutionally protected right. (Defs' Br. At 39; Doc. No. 28.) The Court agrees. As established above, Boswell cannot establish a constitutional violation under the state created danger doctrine as a matter of law. Therefore, because the Due Process Clause does not create an affirmative duty to protect a citizen in this case, Boswell has not established that Officer Feaster's actions deprived Boswell of a constitutional right.

Next, the second step of the qualified immunity analysis looks at whether the constitutional right violated was clearly established, or, in other words, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

Saucier, 533 U.S. at 201-02. In this case, the parties have agreed Officer Feaster did not arrest Mr. Boswell because he had identification, did not appear to be incapacitated by alcohol, and was not a danger to himself or others. (Pl.'s 56.1 ¶ 45; Doc. No.; Defs.' 51.6 ¶ 45; Doc. No.) It is undisputed that Officer Feaster did not believe Mr. Boswell to be intoxicated. (Id. at ¶ 43.) Thus, in light of the situation Officer Feaster confronted, a reasonable officer would not have known that directing someone to leave a park violated a clearly established constitutional right. In sum, because Boswell's claim fails both elements of the qualified immunity analysis, Officer Feaster's actions are protected under qualified immunity and he cannot be held liable for civil damages in this case.

3. Boswell's Monell Claim

Defendants next move for summary judgment on Boswell's claims for damages against the City of New Brunswick, and argue that those claims are barred under *Monell v. Department of Social Services, City of New York*, 436 U.S. 658 (1978). (Defs.' Br. at 17; Doc. No. 28.) *Monell* held that "Congress did not intend municipalities to be held liable unless actions pursuant to official municipal policy of some nature caused a constitutional tort." *Monell*, 436 U.S. at 691. Further, "a municipality cannot be held liable solely because it employs a tort feasor." *Id.* Clarifying this doctrine, the Third Circuit has held "municipal liability for failure to train cannot be predicated solely on a showing that the City's employees could have been better trained." *Colburn v. Upper Darby Township*, 946 F.2d 1017, 1029-30 (3d Cir. 1991). To establish a claim for failure to train, the plaintiff must: (1) identify specific training not provided that could reasonably expect to prevent the alleged constitutional violation; and (2) demonstrate that the risk reduction associated with the proposed training is so great and so obvious that the failure of those responsible for the content of the training program to provide it can reasonably be attributed to a deliberate indifference to the rights of those in similar situations as the plaintiff. *Id.* at 1030.

In this case, Boswell claims that the New Brunswick Police Department violated his civil rights by failing to train and/or supervise its officers and employees regarding the proper care of intoxicated and homeless persons. (Pl.'s Compl. at 6; Doc. No.) However, it has been established above that Boswell cannot establish a constitutional violation. Thus, without a constitutional violation there cannot be any liability imposed upon the City and Police Department. As such, Boswell's claims against the City of New Brunswick fail as a matter of law.

4. Boswell's State Law Claims

It is undisputed that federal subject matter jurisdiction in this case exists as a result of the federal questions presented by Boswell's 42 U.S.C. § 1983 claim and his ancillary *Monell* claim. Above, however, the Court granted summary judgment in favor of Defendants on both of those federal claims. Therefore, Boswell's federal claims have been resolved. In light of the absence of any federal claim, the Court will not exercise supplemental jurisdiction over Boswell's state law claims pursuant to 28 U.S.C. § 1367. A District Court, pursuant to 28 U.S.C. § 1367(c)(3), "may decline to exercise supplemental jurisdiction over a claim . . . if . . . (3) the district court has dismissed all claims over which it has original jurisdiction." *Edlin Ltd. v. City of Jersey City*, No. 07-3431, 2008 U.S. Dist. LEXIS 41118, at *24 (D.N.J. May 23, 2008) (citing *Atkinson v. Olde Economie Fin. Consultants, Ltd.*, No. 05-772, 2006 U.S. Dist. LEXIS 54289, at *5 (W.D. Pa. Aug. 4, 2006)). This determination is discretionary and "[t]he general approach is for a district court to . . . hold that supplemental jurisdiction should not be exercised when there is no longer any basis for original jurisdiction." *Id.*; *see also City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 172 (1997) ("pendent jurisdiction 'is a doctrine of discretion, not of plaintiffs right,' and that district courts can decline to exercise jurisdiction over pendent claims for a number of valid reasons") (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)). Applying this standard to the procedural posture in this case, the Court shall decline in its discretion to exercise supplemental jurisdiction over Boswell's remaining state law claims.

III. CONCLUSION

For the foregoing reasons, the Court will GRANT Defendants' present motion for summary judgment and decline supplemental jurisdiction over Boswell's remaining state law claims. (Doc. No. 22.) In light of that decision, the other parties' pending summary judgment motions are MOOT and will be DENIED as such. (Doc. Nos. 25, 30). Finally, the Court will order the Clerk of the Court to CLOSE this case.

Dated: June 8, 2010

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR., U.S.D.J.

EXHIBIT B

RULE 56.1 RESPONDING STATEMENT OF MATERIAL FACTS

1. Plaintiffs admit that the New Brunswick Police Department is an agency within the City of New Brunswick and is a duly-formed entity of the State of New Jersey.

2. Plaintiffs admit that the New Brunswick Police Department operates pursuant to applicable state and federal laws, and with the rules, regulations, orders, directives, policies and procedures consistent with the Attorney General's Guidelines. *[See Defendant's Exhibit K: Mangarella Deposition, p. 17 line 9 to p. 18 line 10 and p. 26 line 19 to p. 27 line 5]*

3. Plaintiffs admit that all individuals appointed as municipal police officers must successfully complete a training course approved by the New Jersey Police Training Commission and be certified as a police office by the Police Training Commission, pursuant to N.J.S.A. 52:17B-66 *et seq*.

4. Plaintiffs admit that after police academy training, officers in the New Brunswick Police Department receive biannual use of force training, domestic violence training, blood borne pathogen training and firearms training, as required by the Attorney General's Office but administered by instructors within the New Brunswick Police Department. *[See Defendant's Exhibit K: Mangarella Deposition, p. 11 line 8 to p. 12 line 16]*

4a. Plaintiffs **add** that there are no guidelines issued by the Attorney General's Office as to how to recognize an intoxicated person or how to deal with an intoxicated person. *[See Defendant's Exhibit K: Mangarella Deposition, p. 25 lines 8 to 15]*

4b. Plaintiffs **add** that there is no biannual training in the New Brunswick Police Department on how to identify persons suspected of substance abuse, including alcohol. The only training for this is through the police academy training. *[See Defendant's Exhibit K: Mangarella Deposition, p. 30 lines 3 to 24]*

4c. Plaintiffs **add** that the New Brunswick Police Department has not generated any general orders or Standard Operating Procedures (SOPs) dealing with how to handle people who are intoxicated in public or how to handle homeless people. *[See Defendant's Exhibit K: Mangarella Deposition, p. 18 lines 1 to 25]*

4d. Plaintiffs **add** that Peter Mangarella, the Deputy Police Director of the New Brunswick Police Department, is not familiar with any national standards dealing with how to handle intoxicated persons by police officers in public. *[See Defendant's Exhibit K: Mangarella Deposition, p. 21 lines 14 to 17]*

4e. Plaintiffs **add** that there is no policy or procedure in the New Brunswick Police Department dealing with what a police officer is to do when he suspects a person is intoxicated in public. The only training for this situation comes from basic police academy instruction. *[See Plaintiff's Exhibit A: Mangarella Deposition, p. 21 line 23 to p. 22 line 17]*

4f. Plaintiffs **add** that there is no policy in the New

Brunswick Police Department that would mandate that a police officer take into custody a person intoxicated in public, but that officers can bring persons who are highly intoxicated to a medical facility or have technicians brought to the scene to evaluate the person. The police officer has discretion under this policy to take the individual either to the hospital or to the police department. *[See Defendant's Exhibit K: Mangarella Deposition, p. 27 line 6 to p. 29 line 1]*

4g. Plaintiffs **add** that there is no policy in the New Brunswick Police Department dealing with the issue of what to do with a homeless person, but officers can deal with the homeless by getting them to a shelter. There are no city shelters but there is a private shelter. *[See Defendant's Exhibit K: Mangarella Deposition, p. 29 lines 2 to 19]*

4h. Plaintiffs **add** that Deputy Police Director Mangarella, the highest police officer in the New Brunswick Police Department, stated that it there is an individual who is highly intoxicated in a public place, the officers are going to act on that and have the individual brought to a medical facility or have technicians brought to the scene to evaluate the individual. He indicated that this is to protect not only the public, but also the intoxicated person. *[See Defendant's Exhibit K: Mangarella Deposition, p. 28 lines 1 to 10]*

5. Plaintiffs admit that James Feaster has been a police

officer with the New Brunswick Police Department for 26 years. *[See Defendant's Exhibit L: Feaster Deposition, p. 8 lines 9 to 14]*

5a. Plaintiffs **add** that Officer Feaster is a patrol officer in uniform and has never been promoted. *[See Defendant's Exhibit L: Feaster Deposition, p. 9 lines 1 to 9]*

6. Plaintiffs admit that Officer Feaster attended the Middlesex County Police Academy 26 years ago. *[See Defendant's Exhibit L: Feaster Deposition, p. 11 lines 1 to 5]*

7. Plaintiffs admit that after completing the academy training 26 years ago, Officer Feaster completed six-weeks of in-service training with the New Brunswick Police Department. *[See Defendant's Exhibit L: Feaster Deposition, p. 11 lines 10 to 20]*

8. Plaintiffs admit that Officer Feaster received later training in accident investigation, drug recognition, and training for training officers at the range. The drug recognition training took place at the Police Academy in Sea Girt early in his police career. He has had no refresher courses in drug recognition. The drug recognition course did not include alcohol recognition. His only training with alcohol recognition was basic police academy and training with his training officer. *[See Defendant's Exhibit L: Feaster Deposition, p. 11 line 11 to p. 14 line 19]*

9. Plaintiffs admit that in his initial and subsequent training as to how to interact with people he suspects are intoxicated, Officer Feaster was trained to make an evaluation by

looking at their movements, their physical appearance, their breath and other visible signs. *[See Defendant's Exhibit L: Feaster Deposition, p. 84 line 13 to p. 85 line 1]*

10. Plaintiffs admit that Officer Feaster's duties as a patrol officer include issuing summonses for violations of the law, enforcing motor vehicle laws, investigating motor vehicle accidents, investigating criminal activities, settling disputes, enforcing the law and ordinances, and directing traffic. *[See Defendant's Exhibit L: Feaster Deposition, p. 14 line 23 to p. 15 line 3; p. 18 lines 10 to 18]*

11. Plaintiffs admit that at all times relevant, Officer Feaster was acting in his official capacity as a police officer with the New Brunswick Police Department.

12. Plaintiffs admit that on September 4, 2005, Officer Feaster was working the night shift from 8:30 p.m. to 6:45 a.m. *[See Defendant's Exhibit L: Feaster Deposition, p. 16 lines 17 to 22]*

13. Plaintiffs admit that Officer Feaster was assigned to a patrol car and was working alone. *[See Defendant's Exhibit L: Feaster Deposition, p. 19 lines 5 to 19]*

14. Plaintiffs admit that Officer Feaster, driving a marked patrol car, entered Boyd Park by the Rutgers University boathouse and drove along the paved road that runs parallel to the canal. *[See Defendant's Exhibit L: Feaster Deposition, p. 27 line 1 to p.*

28 line 5]

15. Plaintiffs admit that the boundaries of Boyd Park are Route 18 to the west, the New Street overpass to the north, the canal and Raritan River to the east, and the boathouse to the south. *[See Defendant's Exhibit L: Feaster Deposition, p. 23 line 11 to p. 26 line 7]*

15a. Plaintiffs **add** that there are only two ways to get out of Boyd Park – swim the canal and river to Highland Park or cross Route 18, a heavily-traveled six-lane highway.

16. Plaintiffs admit that Officer Feaster saw something by the picnic tables about 30 yards away, and that when he activated his spotlight, he saw a figure or person sit up. *[See Defendant's Exhibit L: Feaster Deposition, p. 28 lines 6 to 24]*

17. Plaintiffs admit that Officer Feaster drove toward the picnic area with his headlights on the person, and notified police headquarters that he was stopping a person in Boyd Park. *[See Defendant's Exhibit L: Feaster Deposition, p. 28 line 25 to p. 31 line 11]*

18. Plaintiffs admit that Officer Feaster exited his vehicle and started walking toward the person, who was about ten feet away at this point. *[See Defendant's Exhibit L: Feaster Deposition, p. 31 lines 12 to 18]*

19. Plaintiffs admit that Officer Feaster walked up to the individual and stood five feet away on the other side of the park

bench. *[See Defendant's Exhibit L: Feaster Deposition, p. 32 lines 2 to 13]*

20. Plaintiffs admit that Officer Feaster could see the individual clearly as the headlights on the patrol car were directed at the individual, who remained seated with his hands on the table as Officer Feaster approached and did not make any statements at that time. *[See Defendant's Exhibit L: Feaster Deposition, p. 33 line 9 to plaintiff 35 line 5]*

21. Plaintiffs admit that Officer Feaster asked the individual for identification. *[See Defendant's Exhibit L: Feaster Deposition, p. 33 lines 9 to 13]*

22. Plaintiffs admit that the individual put his hand into his pocket and handed Officer Feaster an identification card, but did not say anything. *[See Defendant's Exhibit L: Feaster Deposition, p. 35 line 6 to p. 36 line 16]*

23. Plaintiffs admit that the identification card was not a driver's license or credit card, but provided the name and address and date of birth of the individual. *[See Defendant's Exhibit L: Feaster Deposition, p. 35 line 19 to p. 36 line 14]*

23a. Plaintiffs **add** that the card identified the individual as Michael Boswell, gave an address of 5 Elm Row, New Brunswick, and gave Mr. Boswell's social security number. Officer Feaster knew that Elm Row is by the courthouse, but claimed not to know if it is a place there where someone can live or whether it is all commercial. *[See Defendant's Exhibit L: Feaster Deposition, p. 36 line 15 to p. 37 line 24; p. 42 line 21 to p. 43 line 12]*

23b. Plaintiffs **add** that Elm Row is two blocks from New Brunswick police headquarters. The Middlesex County Courthouse is across the street from 5 Elm Row. Elm Row is in a commercial district and 5 Elm Row has long been an office building and has no residences. The signs in the windows of the building show that it is an office building, and there is a sign next to the door that says "Offices For Rent". *[See Plaintiff's Exhibit B: Photographs]*

24. Plaintiffs admit that Mr. Boswell remained seated on the picnic bench and did not say anything. *[See Defendant's Exhibit L: Feaster Deposition, p. 38 lines 1 to 5]*

25. Plaintiffs admit that Officer Feaster called police headquarters to run a warrants check, which came back negative. *[See Defendant's Exhibit L: Feaster Deposition, p. 38 lines 6 to 15]*

26. Plaintiffs admit that Officer Feaster issued Mr. Boswell a summons for being in the park after hours, in violation of City Ordinance 12:28:010, which restricts the use of the park from a half hour after sunset to sunrise. *[See Defendant's Exhibit L: Feaster Deposition, p. 38 lines 16 to 23]*

27. Plaintiffs admit that Officer Feaster handed the summons to Mr. Boswell, who was still sitting, and told him that he had to leave the park. Officer Feaster, who was within five feet of Mr.

Boswell, claims that he did not appear to be intoxicated or incoherent and did not slur his words. *[See Defendant's Exhibit L: Feaster Deposition, p. 43 line 25 to p. 45 line 4]*

28. Plaintiffs admit that Officer Feaster told Mr. Boswell that he was not supposed to be in the park at night and that he was going to have to leave. *[See Defendant's Exhibit L: Feaster Deposition, p. 44 lines 6 to 9]*

29. Plaintiffs admit that Mr. Boswell got up, moved away from the picnic table and started to go toward the canal, which is next to the Raritan River. *[See Defendant's Exhibit L: Feaster Deposition, p. 45 lines 6 to 8]*

30. Plaintiffs admit that Officer Feaster observed Mr. Boswell as he walked away. *[See Defendant's Exhibit L: Feaster Deposition, p. 45 lines 9 to 10]*

31. Plaintiffs admit that Mr. Boswell began walking in the direction of the canal, which was about a hundred yards away. *[See Defendant's Exhibit L: Feaster Deposition, p. 49 lines 6 to 21]*

32. Plaintiffs admit that Officer Feaster stated that he again told Mr. Boswell that he had to leave the park, and he directed Mr. Boswell in the direction of Route 18 and its intersection with Commercial Avenue. *[See Defendant's Exhibit L: Feaster Deposition, p. 50 lines 4 to 12]*

32a. Plaintiffs **add** that Officer Feaster anticipated that Mr. Boswell would follow his instruction and leave the park by crossing

Route 18. Officer Feaster did not see Mr. Boswell cross Route 18 and did not see the accident. *[See Defendant's Exhibit L: Feaster Deposition, p. 76 line 20 to p. 77 line 5]*

33. Plaintiffs admit that Mr. Boswell walked around the concession stand and walked towards Commercial Avenue and Route 18. *[See Defendant's Exhibit L: Feaster Deposition, p. 51 line 4 to p. 52 line 5]*

34. Plaintiffs admit that Officer Feaster stated that he then saw an empty quart bottle of alcohol under the bench where Mr. Boswell had been sitting. *[See Defendant's Exhibit L: Feaster Deposition, p. 45 line 20 to p. 46 line 11]*

35. Plaintiffs admit that Officer Feaster stated that he never observed Mr. Boswell drinking from that bottle, but believed that he had been drinking from it. *[See Defendant's Exhibit L: Feaster Deposition, p. 47 lines 10 to 16]*

36. Plaintiffs admit that Officer Feaster picked the bottle up, emptied it and threw it in the trash. *[See Defendant's Exhibit L: Feaster Deposition, p. 47 lines 1 to 5]*

37. Plaintiffs admit that Officer Feaster stated that he saw Mr. Boswell rip up the ticket he had been given. *[See Defendant's Exhibit L: Feaster Deposition, p. 51 lines 12 to 18]*

38. Plaintiffs admit that Mr. Boswell was saying something, but Officer Feaster could not make out what he was saying, in part because he could not understand what Mr. Boswell was saying. *[See*

Defendant's Exhibit L: Feaster Deposition, p. 51 line 21 to p. 53 line 3]

39. Plaintiffs admit that Officer Feaster returned to his patrol vehicle and began writing a second ticket for Mr. Boswell for having an open container of beer. *[See Defendant's Exhibit L: Feaster Deposition, p. 52 line 5 to p. 53 line 14]*

40. Plaintiffs admit that Officer Feaster indicated that he intended to serve this second ticket by either sending it to Mr. Boswell by mail or by attaching it to the first summons and serving it on him in court. *[See Defendant's Exhibit L: Feaster Deposition, p. 54 lines 19 to 21]*

40a. Plaintiffs **add** that Officer Feaster wrote this second ticket before the accident. Mr. Boswell was not running from Officer Feaster and Officer Feaster could have called to Mr. Boswell to wait. *[See Defendant's Exhibit L: Feaster Deposition, p. 53 line 15 to p. 56 line 1]*

41. Plaintiffs admit that Officer Feaster stated that he continued to observe Mr. Boswell as he walked out of Boyd Park towards Commercial Avenue. Plaintiffs admit that Officer Feaster claims that he did not observe Mr. Boswell having any difficulty with his walking. *[See Defendant's Exhibit L: Feaster Deposition, p. 66 line 22 to p. 67 line 11]*

42. Plaintiffs admit that Officer Feaster claims that Mr. Boswell appeared to understand him, was cooperative with him and

responded immediately and appropriately to all commands. Plaintiffs admit that Officer Feaster claims that Mr. Boswell's speech was clear and coherent, Mr. Boswell's physical coordination was controlled and balanced, and that he detected no odor of alcohol during his interaction with Mr. Boswell. *[See Defendant's Exhibit L: Feaster Deposition, p. 44 line 19 to p. 45 line 16; p. 48 lines 18 to 22; p. 57 lines 13 to 16; p. 69 lines 14 to 17]*

42a. Plaintiffs **add** that Officer Feaster testified that he was within five feet of Mr. Boswell but also testified that he did not get close enough to smell Mr. Boswell's breath, and he does not recall the appearance of Mr. Boswell's pupils. *[See Defendant's Exhibit L: Feaster Deposition, p. 44 line 17 to p. 45 line 19]*

43. Plaintiffs admit that Officer Feaster claims that based on his training and experience, he made sufficient observations of Mr. Boswell to determine that he was not intoxicated. *[See Defendant's Exhibit L: Feaster Deposition, p. 90 line 23 to p. 91 line 9]*

44. Plaintiffs admit that Officer Feaster claims that based on his training and observations, he did not believe that Mr. Boswell was under the influence of alcohol or a controlled substance. *[See Defendant's Exhibit L: Feaster Deposition, p. 91 lines 4 to 6]*

45. Plaintiffs admit that Officer Feaster testified that he chose not to arrest Mr. Boswell because he had identification, did not appear to be incapacitated by alcohol, and was not a danger to himself of others. *[See Defendant's Exhibit L: Feaster Deposition,*

p. 72 line 15 to p. 73 line 1; plaintiff 85 line 17 to p. 86 line 11] Plaintiffs admit that had Officer Feaster determined that Mr. Boswell was incapacitated by alcohol, he could have taken him to Robert Wood Johnson University Hospital for evaluation. *[See Defendant's Exhibit K: Mangarella Deposition, p. 34 line 14 to p. 35 line 1]* Plaintiffs admit that Officer Feaster claims that he did not think Mr. Boswell was a danger to himself or that he was intoxicated. *[See Defendant's Exhibit L: Feaster Deposition, p. 69 lines 1 to 4; p. 85 line 17 to p. 86 line 11]*

46. Plaintiffs admit that while Officer Feaster was still sitting in his patrol car in the park, he was advised by the dispatcher that there was an accident on Route 18 and Commercial Avenue. *[See Defendant's Exhibit L: Feaster Deposition, p. 77 lines 7 to 11]*

47. Plaintiffs admit that Officer Feaster drove his patrol car to the intersection of Route 18 and Commercial Avenue and that he was the first officer at the scene. Plaintiffs admit that the accident occurred in the southbound lanes of Route 18. *[See Defendant's Exhibit L: Feaster Deposition, p. 77 lines 11 to 17]*

48. Plaintiffs admit that Officer Feaster observed two vehicles in the intersection with people out of the cars in an excited state. He was told that a person was under one of the cars. When Officer Feaster looked under the car, he saw a person who was dressed the same as Mr. Boswell. *[See Defendant's Exhibit*

L: Feaster Deposition, p. 77 lines 18 to 25]

49. Plaintiffs admit that Officer Feaster radioed for an ambulance, a road supervisor, an identification unit and the traffic safety unit. *[See Defendant's Exhibit L: Feaster Deposition, p. 79 lines 5 to 9]*

50. Plaintiffs admit that Officer Barber, the traffic safety officer, arrived and took over the accident investigation. *[See Defendant's Exhibit L: Feaster Deposition, p. 7 to 11]*

50a. Plaintiffs **add** that the accident report prepared by Officer Barber lists Mr. Boswell as being homeless. The report indicates that the traffic light was green for cars on Route 18 and that Mr. Boswell walked onto Route 18 against the light. *[See Plaintiff's Exhibit F]*

51. Plaintiffs admit that Officer Feaster testified that he did not see Mr. Boswell cross the intersection. *[See Defendant's Exhibit L: Feaster Deposition, p. 75 lines 16 to 17]*

52. Plaintiffs admit that Mr. Boswell has no independent recollection of the accident or of the events leading to the accident. *[See Defendant's Exhibit O: Ethel Boswell Deposition, p. 49 line 22 to p. 50 line 18]* Plaintiffs admit that there are no fact witnesses to the interaction between Mr. Boswell and Officer Feaster.

53. Plaintiffs admit that they allege that Officer Feaster, the City of New Brunswick and the New Brunswick Police Department

were negligent, violated Mr. Boswell's civil rights and violated the New Jersey Civil Rights Act. *[See Defendant's Exhibit E: Complaint]*

54. Plaintiffs admit that they have retained James A. Williams, a police liability expert, and that Mr. Williams had opined that Officer Feaster should have removed Mr. Boswell from Boyd Park because Mr. Boswell was highly intoxicated. Plaintiffs admit that Mr. Williams opines that by failing to remove Mr. Boswell from the park, Officer Feaster ignored his training and the requirements of the New Brunswick Police Department and the State of New Jersey. *[See Defendant's Exhibit P]*

54a. Plaintiffs **add** that Mr. Williams opined that police officers are trained to understand the justifications of the New Jersey statutes that apply to the use of force in controlling the actions of the public. He opined that police officers are trained under the guidelines of the New Jersey Police Training Commission, Basic Course for Police Officers, section 6.4.6, to recognize and appropriately interact with persons demonstrating anger, hostility, hysteria, fear, intoxication and deranged conditions. Mr. Williams opined that officers are trained in the procedures that allow them to properly and effectively communicate with and control the various reactions of the public. Mr. Williams opined that police officers are trained under the guidelines, section 3.5.2E, to have an awareness of his/her own emotional reactions to various types of individuals, and that this training highlights handling excited individuals who are emotionally disturbed or otherwise mentally or physically unable to respond to the directions or commands of the officer. *[See Defendant's Exhibit P]*

54b. Plaintiffs **add** that the Deputy Police Director of the New Brunswick Police Department admitted that after basic police academy training, the only training received by New Brunswick police officers is biannual training in use of force, domestic violence, blood borne pathogen and firearms. *[See Defendant's Exhibit K: Mangarella Deposition, p. 30 lines 3 to 24]*

54c. Plaintiffs **add** that Mr. Williams opined that Officer Feaster grossly failed to use due caution and the use of trained and known procedures for the handling of intoxicated persons, and that by failing to even attempt to protect a clearly unstable person from injuring himself, Officer Feaster not only allowed Mr. Boswell to place himself in harm's was, but in fact, ordered him from a place of safety into a heavily traveled highway to be struck down and run over by vehicles. *[See Defendant's Exhibit P]*

54d. Plaintiffs **add** that Mr. Williams' opinions are based on his specialized training and knowledge of police policy, practice and procedure, as well as his continued involvement in police and security training nationally, and his continued academic participation as an adjunct professor for criminal justice studies at Rowan University. His opinions are provided with a reasonable degree of professional certainty within the field of law enforcement. *[See Defendant's Exhibit P]*

54e. Plaintiffs **add** that Mr. Williams issued a supplemental report after receiving additional information and documents, including the deposition of Officer Feaster and the report of Dr. Gary Lage. Mr. Williams noted that Dr. Lage opined that Mr. Boswell's level of intoxication was the major causative factor in Mr. Boswell's inability to protect himself from injury, but that Officer Feaster testified that Mr. Boswell was not intoxicated or incoherent. Mr. Williams stated that these conflicting statements reinforce his stated opinions, and that there is no factual documentation that Officer Feaster made an effort to provide the mandated police policy and procedural requirements to safely remove an intoxicated and homeless Michael Boswell to a shelter for safety and detoxification. He reiterated that it is national police policy, including New Jersey, to safely remove intoxicated and homeless persons from the city streets to a place of security and detoxification. Mr. Williams opined that Officer Feaster blatantly disregarded police policy and procedures of the State of New Jersey and the requirements of the New Brunswick Police Department mandating the handling of intoxicated and/or homeless persons. *[See Plaintiff's Exhibit C]*

55. Plaintiffs admit that the New Brunswick defendants have retained William F. Kraus, a former police chief, and that Mr. Kraus opined that based upon Mr. Boswell's behavior and conduct while in the presence of Officer Feaster, all actions taken by

Officer Feaster were proper and within accepted police practices and procedures. He stated that in the absence of shown intoxication, Officer Feaster could not have detained Mr. Boswell and he was not under a duty to do so. *[See Defendant's Exhibit Q: Kraus Report]*

55a. Plaintiffs **add** that Mr. Kraus stated: "If no evidence of intoxication was shown, under the law, no discretionary authority legally existed for Officer Feaster to detain Mr. Boswell." *[See Defendant's Exhibit Q: Kraus Report]*

55b. Plaintiffs **add** that Mr. Kraus stated in his deposition that if Officer Feaster did not believe Mr. Boswell was intoxicated, he had no duty to assist him, but that if Officer Feaster thought Mr. Boswell was intoxicated, he could have assisted Mr. Boswell home or to a place where he could be safely taken care of. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 14 line 12 to 15 line 10]*

55c. Plaintiffs **add** that based upon the records, Mr. Kraus made no conclusion whether or not Mr. Boswell was intoxicated. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 17 lines 9 to 17]*

55d. Plaintiffs **add** that Mr. Kraus stated that a police officer has a duty to gather all the facts and to make inferences from what he sees. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 20 line 21 to p. 21 line 1]*

55e. Plaintiffs **add** that Mr. Kraus stated that if a person with a .24 showed signs of intoxication and incapacitation, it would be a breach of duty for the police officer to send them across the highway. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 24 lines 5 to 12]*

55f. Plaintiffs **add** that Mr. Kraus stated that if Officer Feaster suspected Mr. Boswell to be intoxicated, he may move him to a safe place. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 28 line 24 to p. 29 line 4]*

55g. Plaintiffs **add** that Mr. Kraus stated that a police officer has a duty to recognize the signs and symptoms of intoxication, which include slurring of speech, the inability to move, misunderstanding of directions, falling down, odor of alcohol, and sleeping. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 30 line 19 to p. 31 line 4]*

55h. Plaintiffs **add** that Mr. Kraus stated that Officer Feaster had a duty to observe what Mr. Boswell was doing and to recognize the signs of intoxication if they were present. *[See Plaintiff's Exhibit D: Kraus Deposition, p. 33 lines 14 to 24]*

56. Plaintiffs admit that several experts have been retained by the parties to opine regarding Mr. Boswell's blood alcohol concentration (BAC) of .244, taken at Robert Wood Johnson University Hospital after the accident. Plaintiffs admit that Dr. Richard Saferstein, plaintiffs' toxicologist, opined that a typical individual with a BAC range of .24 would have displayed

unmistakable signs of alcohol impairment, such as poor coordination and balance, slurred speech and an unsteady gait. *[See Defendant's Exhibit R: Saferstein Report]* Plaintiffs admit that Dr. Thomas Schwartzer and Dr. Robert Pandina, experts for these defendants, indicated that Mr. Boswell had a history of alcohol-related complaints, hospital visits and admissions, and physiological changes which were consistent with chronic alcoholism and an increased tolerance to alcohol. *[See Defendant's Exhibit S: Schwartzer Report; Defendant's Exhibit T: Schwartzer Deposition, p. 22 line 6 to p. 34 line 24; Defendant's Exhibit U: Pandina Report; Defendant's Exhibit V: Pandina Deposition, p. 24 lines 20 to 25]* Plaintiffs admit that these experts stated that a person with a high tolerance for alcohol could speak without slurring, respond reasonably to questions, sit up and remain still, display fine motor skills, and display gross motor control. *[See Defendant's Exhibit N: Lage Deposition, p. 37 line 21 to p. 38 line 17; Defendant's Exhibit U: Pandina Report; Defendant's Exhibit V: Pandina Deposition, p. 38 line 18 to p. 40 line 22; Defendant's Exhibit T: Schwartzer Deposition, p. 26 lines 8 to 15; p. 41 line 3 to p. 43 line 1; p. 40 line 24 to p. 41 line 2]*

56a. Plaintiffs **add** that Dr. Saferstein, the former head of the New Jersey State Crime Lab, stated that in Mr. Boswell's state of intoxication, his condition would have been obvious to individuals who came in contact with him. He stated that a reasonably trained and reasonably perceptive police officer would have ben able to observe Mr. Boswell's visible state of intoxication. He stated that a BAC of 0.24% will adversely affect visual acuity, resulting in a significant loss of depth and distance perceptions. Dr. Saferstein opined, to a reasonable degree of scientific certainty, that Mr. Boswell was in a significantly impaired state as a result of alcohol intoxication when he attempted to cross Route 18 and was struck by the vehicles. Dr. Saferstein opined that in his intoxicated state, Mr. Boswell's poor sense of judgment and poor motor functions significantly reduced his ability to cross the road in a careful and trouble-free manner. He stated that at the level of intoxication of 0.24%, a person will normally experience a significant reduction in muscular coordination and may be expected to exhibit poor balance and poor body concentration. Increased reaction or response times will also be exhibited, as will difficulties with hand-to-eye coordination. Dr. Saferstein stated that these deficiencies will noticeably impact on an individual's ability to respond to a sudden, unexpected occurrence. A deterioration of judgment and self-control is to be expected with the result being a diminution in one's normal sense of caution and self-restraint. Such an individual normally exhibits a false sense of self-confidence in one's behavioral pattern. Dr. Saferstein stated that an individual so influenced becomes a safety risk, taking chances that would normally be by-passed in he were alcohol-free. *[See Defendant's*

Exhibit R: Saferstein Report]

56b. Plaintiffs **add** that Dr. Saferstein opined, to a reasonable degree of scientific certainty, that Mr. Boswell was in a significantly impaired state at the time of his encounter with Officer Feaster, and that this impairment came about as a result of significant alcohol consumption. Dr. Saferstein stated that the visibly impaired condition of Mr. Boswell would have been obvious to a reasonably trained and reasonably perceptive police officer in Mr. Boswell's presence that evening. He stated that proper precautions should have been taken by Officer Feaster to prevent unnecessary risk that would have endangered Mr. Boswell's health and well-being. Dr. Saferstein opined that the failure of Officer Feaster to utilize the appropriate precautions in dealing with a significantly intoxicated individual must be considered a proximate cause leading to Mr. Boswell's serious injuries. *[See Defendant's Exhibit R: Saferstein Report]*

56c. Plaintiffs **add** that Dr. Gary Lage, an internist and an expert for defendants Byrnes and Eickman, testified that Mr. Boswell's BAC at the time of the accident could have been as high as a .25 or as low as a .23. He stated that the typical effects of alcohol intoxication at that level affects the cerebellum, and as the BAC increases, more areas of the brain, including the frontal lobe, the psychomotor and the cerebellum are affected. He stated that at Mr. Boswell's level of intoxication, all of these areas would be affected. The frontal lobe is affected by decreased inhibition, diminished judgment, dulling of attention, sedation, impaired coordination. The psychomotor area of the brain is affected by disorientation, impaired balance and slurred speech. the cerebellum is involved with motor functions. *[See Plaintiff's Exhibit E: Lage Deposition, p. 14 lines 2 to 15; p. 15 line 23 to p. 18 line 22]*

56d. Plaintiffs **add** that Dr. Lage stated that a person untrained in observing alcohol intoxication in a person can recognize that a person withing the range of .2 to .4 would be intoxicated. He stated that the overwhelming majority of people are visibly intoxicated above a .15. He stated that a person trained in alcohol detection would be more observant of the signs and symptoms and effects of alcohol than somebody who is not trained. *[See Plaintiff's Exhibit E: Lage Deposition, p. 20 line 6 to p. 21 line 14]*

56e. Plaintiffs **add** that Dr. Lage stated that at a BAC of .244, Mr. Boswell would have lack of coordination, would not be able to function correctly, would probably not be able to walk correctly, and would exhibit more observable effects such as impaired reaction time, markedly delayed reaction times, impaired vision, including depth perception, night vision and peripheral vision. He stated that these are impaired when you get to a blood alcohol level even approaching this number. *[See Plaintiff's*

Exhibit E: Lage Deposition, p. 21 line 15 to p. 22 line 9]

56f. Plaintiffs **add** that Dr. Lage opined that prior to the accident, he would expect someone who encountered Mr. Boswell, such as Officer Feaster, to have observed the signs of intoxication in him with a BAC of .244. Dr. Lage stated that at Mr. Boswell's level of intoxication, the visible effects of intoxication, he would expect a trained observer such as Officer Feaster to observe them. *[See Plaintiff's Exhibit E: Lage Deposition, p. 23 lines 15 to 25; p. 28 line 15 to p. 29 line 3]*

It is the plaintiffs' position that the New Brunswick defendants have failed to establish that there is no genuine issue of material fact or that they are entitled to summary judgment as a matter of law.

EXHIBIT C

POINT I

THE DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE ARE DISPUTED MATERIAL FACTS

On a motion for summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.Pr. 56(c). Where disputed issues of material fact exist, the court may not resolve them on a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986). A material fact is one that can affect the outcome under the governing law. Id. The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In determining whether a genuine issue of material fact exists, the court must draw all inferences in the light most favorable to the non-moving party, and where the parties' evidence is contradictory, the non-moving party's evidence must be taken as true. Big Apple BMW, Inc. v. BMW of North America, 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993).

Here, there are several disputed issues of material fact, the primary one being the intoxication of Mr. Boswell. Whether Mr. Boswell was visibly intoxicated is a material fact that will affect the outcome of this case under the law governing plaintiff's 42 U.S.C. § 1983 claims and under the law governing plaintiff's state claims. Officer Feaster claims that he saw nothing to indicate that Mr. Boswell was intoxicated or incapacitated. But Mr. Boswell had a .244% blood alcohol level, and plaintiff's experts opine that he would have shown visible signs and symptoms of intoxication. Even the defendant's expert acknowledged that a tolerant drinker will show some signs of intoxication.

There is a dispute regarding whether Officer Feaster did in fact observe signs and symptoms of intoxication in Mr. Boswell. Officer Feaster testified that he believed that Mr. Boswell had been drinking from the quart bottle. When Officer Feaster told Mr. Boswell he had to leave the park, Mr. Boswell headed for the canal and river. This is not the direction that a non-incapacitated individual would have taken to leave the park. Officer Feaster claimed that Mr. Boswell did not slur his speech, but he also stated that he could not understand what Mr. Boswell was saying.

There is a dispute regarding the homelessness of Mr. Boswell. Officer Feaster claimed that Mr. Boswell was not homeless because he had provided an identification card with an address on it. But the address was 5 Elm Row, which is an office building with no residences in it. Elm Row is two blocks from the New Brunswick Police Department and is opposite the county courthouse. Officer Feaster, as a 26-year veteran of the New Brunswick Police Department, had to know that 5 Elm Row was solely an office building. Under the circumstances, genuine issues of material fact exist that preclude the grant of summary judgment.

EXHIBIT D

H
Only the Westlaw citation is currently available.NOT FOR PUBLICATION

United States District Court,
D. New Jersey.
Angel **PERDOMO**, Petitioner,
v.
UNITED STATES of America, Respondent.
Civil Action No. 05-1961 (SRC).

Feb. 25, 2009.

West KeySummary
Habeas Corpus 197 ⚷791

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)5 Determination and Disposition; Relief
197k791 k. In General. Most Cited Cases
Reconsideration of a defendant's habeas petition was necessary to prevent manifest injustice. Although the defendant had filed his original petition within the statute of limitations, a filing error in the court caused the dismissal of the petition as untimely when the defendant sought to amend it. The defendant's attorney certified that he filed the petition on time, and the certification was stamped received by the court clerk's office. For some unknown reason, the action was never opened by the court and the court had no record of the filing. 28 U.S.C.A. § 2255.

Angel Persomo, Lewisburg, PA, pro se.

Melissa Lyn Jampol, Office of the U.S. Attorney, Newark, NJ, for Respondent.

OPINION

CHESLER, District Judge.

*1 Presently before the Court is a motion for reconsideration of the Court's January 9, 2007 Order dismissing as time-barred the petition filed by pro se Petitioner Angel Perdomo ("Petitioner" or "Perdomo") for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2255 [docket item no. 22]. Petitioner had moved to vacate, set aside or correct his conviction in the criminal action docketed as *United States v. Angel Perdomo,* criminal number 99-457. Respondent United States of America (the "Government") has filed an Answer taking the position that the Court should not reconsider its Dismissal Order, as it correctly dismissed the petition as time-barred. The Government alternatively argues that, and in the event the Court does grant reconsideration, that the § 2255 motion should be dismissed on its lack of substantive merit [docket item no. 26].

The Court will first consider whether Petitioner is entitled to the remedy of reconsideration. For reasons discussed below, the Court finds that reconsideration of the January 9, 2007 Order dismissing Perdomo's habeas petition as untimely is warranted. The Court will then proceed to reconsider his § 2255 motion on its merits.

I. RELEVANT FACTS

A. *Procedural Background*

On February 13, 2001, Perdomo was sentenced to a prison term of 200 months, in accordance with the United States Sentencing Guidelines, on the indicted charge that he conspired to distribute more than 500 kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Perdomo appealed his conviction, which was affirmed by the Third Circuit on April 29, 2002. *See United States v. Perdomo,* 38 Fed. Appx. 111 (3d Cir.2002). Perdomo did not file a petition for writ of certiorari within the 90 days provided by 28 U.S.C. § 2101(c) and Rule

13.1 of the Supreme Court Rules. Accordingly, the judgment against him became final on Monday, July 29, 2002. *Kapral v. United States,* 166 F.3d 565, 572 (3d Cir.1999) (explaining that when a defendant does not seek a writ of certiorari, the judgment of conviction becomes final upon the expiration of time allowed for filing a request for certiorari review).

The instant civil matter, collaterally attacking Perdomo's conviction, appeared to have been initiated on April 11, 2005. On that date, the Court docketed a pleading submitted by Perdomo entitled "Memorandum In Support of Motion To Vacate, Set Aside, Or Correct Sentence" and opened this case. In the memorandum, Petitioner asserted that he "submitted a § 2255 Motion on April 22, 2003" and that "the motion has lain fallow since that time." (Pet. Mem. In Support Of Motion To Vacate, Set Aside, Or Correct Sentence [docket item no. 1] at 1). The Court, however, had no record of the April 2003 petition, and Petitioner failed to provide proof, in opposition to the Government's motion to dismiss the petition, that he had in fact filed, or at least attempted to file, his petition on or around April 22, 2003. Accordingly, and as more fully discussed in the January 9, 2007 Opinion [docket item no. 13], the petition was dismissed by Order dated January 9, 2007 [docket item no. 12] as time-barred by the one-year limitations period applicable to § 2255 actions.

***2** Following the entry of the Order of dismissal, Petitioner wrote to the Court on May 14, 2008 [docket item no. 22] and enclosed with that letter a copy of two documents, both stamped "Received-Clerk U.S. District Court 2003 APR 25 P 2:46." One document is a pleading in the case of *United States of America v. Angel Perdomo,* Criminal No. 99-457, clearly labeled a "Motion To Vacate Sentence Pursuant to 28 U.S.C. S. 2255." It was signed by Angel Perdomo, proceeding pro se, and notarized by James Patton, an Attorney at Law in the State of New Jersey, on April 24, 2003.[FN1] The other document is a Certification of Service, also bearing the *United States v. Perdomo* criminal action caption, in which Mr. Patton certifies that "[o]n April 25, 2003, on behalf of Angel Perdomo, pro se, I filed an original and two of the annexed petition for post conviction relief with the Clerk, United States District Court, Newark, New Jersey" and also that he mailed a copy of the petition to Bruce Repetto in the Newark Office of the United States Attorney.[FN2] The Court, in response, issued an Order stating that in light of Petitioner's pro se status and in the interests of justice, it would treat the May 14, 2008 letter as a motion for reconsideration of the January 9, 2007 Order [docket item no. 23]. As directed, the Government filed its response.

FN1. Mr. Patton represented Petitioner in connection with his appeal of the conviction.

FN2. Mr. Repetto was the Assistant United States Attorney who handled the criminal prosecution of Petitioner.

B. ***Facts Relating to Perdomo's Criminal Conviction***

The following is a synopsis of the facts underlying the Indictment brought against Perdomo. The summary is based on the Pre-Sentence Report.

In or about April 1998, Perdomo met with members of a drug smuggling organization seeking a New Jersey location to store cocaine shipments intended for New York area buyers. They arranged to have Perdomo's business, an automobile repair garage in New Jersey, serve as the location to off-load and store large shipments of cocaine hidden in pineapples and other produce. Jose Luis Diaz, a high-ranking member of the drug organization, promised to pay Perdomo $50,000 in exchange for use of the garage. At the direction of the organization, Perdomo purchased three vans for use in storing and transporting the cocaine deliveries.

A day or two after the meeting, a tractor trailer delivered 1,050 kilograms of cocaine hidden in crates of carrots and pineapples to Perdomo's garage. Perdomo and others unloaded the shipment and loaded crates onto two vans, which proceeded to New York City. Though one of the vans successfully delivered its shipment to a buyer, the other van was seized by police on April 29, 1998. New Jersey state police interviewed Perdomo. He told the police that the reason the van had been seen at his business was that he was "doing a brake job on the truck."

In June 1998, a shipment of 1,200 kilograms of cocaine was delivered to a warehouse in Lyndhurst, New Jersey. Carlos Rodriguez, who worked as a mechanic for Perdomo's business, helped transfer the cocaine to a truck for delivery. When it was transported to the intended buyers, and they were not ready to accept delivery, Perdomo arranged to have the cocaine stored at an acquaintance's garage. A week later, Perdomo instructed his acquaintance to load the cocaine onto another van for delivery. Perdomo followed the shipment as it was transported from the garage to a motel in Secaucus, New Jersey, where it was picked up the next day. In return for use of the garage, Perdomo gave his friend a tow truck.

*3 A third shipment, carrying 1,200 kilograms of cocaine, arrived in New Jersey in July 1998. It was off-loaded onto one of Perdomo's vans. Perdomo's vans were also used in transporting a shipment of 1,200 kilograms of cocaine that arrived in New Jersey in September 1998. This load was abandoned at a New Jersey rest stop due to police surveillance.

C. *Indictment, Plea and Sentencing*

On August 10, 1999, a one-count Indictment was filed in the District of New Jersey charging that from March 1998 to August 10, 1999, Petitioner and Carlos Rodriguez conspired with each other and others to distribute more than 500 kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1). The case against Perdomo went to trial, but after one day of trial testimony, he pleaded guilty to the Indictment. Perdomo was represented at trial and at his plea hearing by attorney Robert G. Rosenberg. At the May 24, 2000 plea hearing, Perdomo admitted his knowing and intentional participation in the conspiracy:

Q: Did you, in New Jersey, agree with Carlos Rodriguez, Julio Ramos, Jose Luis Diaz and others to distribute more than 500 kilograms of cocaine during the period April, 1998 through August, 1999.

A: Yes.

Q: Did you, from approximately April, 1998 until your arrest in August, 1999 agree to distribute more than 500 kilograms of cocaine on at least three occasions in [the] northern New Jersey area by facilitating the transportation of the cocaine, by helping to tranship the cocaine from interstate tractor trailers to truck and vans for delivery in the New York metropolitan area?

A: Yes.

Q: Did you, from approximately April, 1998 until August, 1999, arrange to store cocaine until the purchasers of cocaine were ready to receive it from you?

A: Yes, sir.

Q: Did you do these acts knowingly and intentionally?

A: Yes, sir.

Q: Did you do these acts for money?

A: Yes, sir.

(5/24/00 Tr. at 25:3-23.) Counsel for the Government represented to the Court that it could prove the elements of the offense to which Perdomo pled guilty, without relying on Perdomo's testimony. (*Id.* at 26:2-7.)

Perdomo also testified at the plea hearing that he read the Indictment, understood the charge against him and had decided to plead because he was in fact guilty of the charge. (*Id.* at 9:13-25; 26:9-27:17.) Perdomo stated under oath that he made the decision to plead guilty voluntarily and without being pressured. (*Id.* at 12:5-24; 27:18-23.) He also testified that he discussed the plea with his attorney, Mr. Rosenberg, felt that his attorney had adequately answered his questions and was satisfied with Mr. Rosenberg's services. (*Id.* at 11:14-23; 13:5-21; 18:21-22.)

In light of these admissions and sworn statements by Perdomo, the Court accepted his guilty plea.

The Court sentenced Perdomo on February 13, 2001. He was represented at the sentencing hearing by Mr. Rosenberg and by Ismael Gonzalez, Esq. They argued for a two point offense level decrease pursuant to U.S.S.G. § 3E1.1 (a) for acceptance of responsibility. They also advocated an Guidelines adjustment to take into account Perdomo's minor role in the conspiracy. The Court rejected Perdomo's request for a minor role adjustment. It did, however, award the requested two-level decrease for acceptance of responsibility, after Perdomo testified, as he had at the plea hearing, that he was guilty of the offense charged. Finding a total offense level of 36, a criminal history category of I, and a resulting guideline range of 188 to 235 months, the Court sentenced Perdomo to a prison term of 200 months, five years' supervised release and a $5,000 fine.

II. MOTION FOR RECONSIDERATION

***4** Rule 12 of the Rules Governing Section 2225 Proceedings for the United States District Courts provides in relevant part that, in the absence of procedure specifically prescribed by the § 2255 Rules, the Court may apply the Federal Rules of Civil Procedure to a § 2255 action. Though the Federal Rules of Civil Procedure do not expressly provide for motions for reconsideration, the Local Civil Rules of the District of New Jersey do. *United States v. Compaction Sys. Corp.,* 88 F.Supp.2d 339, 345 (D.N.J.1999).

Local Civil Rule 7.1(i) creates a procedure by which a court may reconsider its decision upon a showing that dispositive factual matters or controlling decisions of law were overlooked by the court in reaching its prior decision. *See Bryan v. Shah,* 351 F.Supp.2d 295, 297 (D.N.J.2005); *Bowers v. Nat'l Collegiate Athletic Assoc.,* 130 F.Supp.2d 610, 612 (D.N.J.2001). Because reconsideration is "an extraordinary remedy," it is "to be granted "very sparingly." *See NL Indus. Inc. v. Commercial Union Ins. Co.,* 935 F.Supp. 513, 516 (D.N.J.1996); *Maldonado v. Lucca,* 636 F.Supp. 621, 630 (D.N.J.1986). A motion under Rule 7.1(i) may be granted only if: (1) "an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice." *Database Am., Inc. v. Bellsouth Advert. & Publ'g Corp.,* 825 F.Supp. 1216, 1220 (D.N.J.1993); *North River Ins. Co. v. CIGNA Reinsurance Co.,* 52 F.3d 1194, 1218 (3d Cir.1995).

The Court finds that the facts of this case justify reconsideration. The Court's Dismissal Order was based on the untimely filing of Petitioner's § 2255 motion on April 11, 2005. He has subsequently demonstrated to the Court that he submitted the petition to the Court for filing in or about April 2003. Attorney James Patton certified that he filed the petition on Perdomo's behalf on April 25, 2003. Both the § 2255 motion and the attorney certification accompanying it are stamped received by the Clerk's Office of this Court on April 25, 2003. The Court does not require a filing fee in connection with a § 2255 action. Yet, for some unknown reason, a § 2255 action was not opened by the Court on that date and the Court has no record of this filing.

Petitioner's right to challenge his sentence under § 2255 should not be prejudiced due to an apparent filing error by the Court. The Court finds that the evidence presented by Perdomo of his attempt to file the petition on April 25, 2003 warrants treating the petition as filed on that date. Indeed, his April 11, 2005 Memorandum specifically references the § 2255 motion filed in submitted in April 2003, stating that it was prepared with the assistance of Mr. Patton and noting that he was expanding his arguments because the Government had not yet answered. Because the challenged conviction became final on July 29, 2002, the Court concludes that Perdomo's habeas petition was filed within the one-year limitations period applicable to § 2255 actions. [FN3] 28 U.S.C. § 2255. Treating the habeas petition as timely filed permits the Court to reach the merits of his motion to vacate, set aside or correct his sentence, whereas the April 11, 2005 filing on which the January 9, 2007 dismissal Order is based resulted in a denial of relief without consideration of the merits. Moreover, crediting the assertion that the instant petition was submitted for filing in April 2003 falls in line with Third Circuit jurisprudence directing that a pro se habeas petition and any supporting submissions "must be construed liberally and with a measure of tolerance." *Fadayiro v. United States,* 30 F.Supp.2d 772, 774-75 (D.N.J.1998) (citing *Royce v. Hahn,* 151 F.3d 116, 118 (3d Cir.1998) and *United States v. Brierley,* 414 F.2d 552, 555 (3d Cir.1969)).

FN3. Section 2255 provides that the one-year period a defendant has to file for relief under the section runs from the latest of four specified events:

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Here, the time began to run when Perdomo's conviction became final, as the other provisions do not apply. While Petitioner's § 2255 motion raises a claim under *Booker,* that claim does not have the effect of postponing the start date of the one-year filing period, the rule recognized by *Booker* was not "made retroactively applicable to cases on collateral review." *See* Point III.B., below.

***5** For these reasons, reconsideration of the January 9, 2007 Order is necessary to prevent manifest injustice. The Court will therefore vacate the January 9, 2007 Order, re-open this action and adjudicate Perdomo's § 2255 motion on its merits.

III. MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE

Title 28 U.S.C. § 2255 permits a prisoner in federal custody to attack the validity of his sentence as having been imposed in violation of the Constitution. *United States v. Nino,* 878 F.2d 101, 103 (3d Cir.1989). Petitioner's April 25, 2003 submission bases the plea for relief under § 2255 on the claim that he was denied his Sixth Amendment right to effective assistance of counsel. *McMann v. Richardson,* 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (holding that Sixth Amendment guarantee of assistance of counsel to accused in criminal prosecution includes right to effective assistance of counsel). According to Petitioner, the legal representation he received was constitutionally deficient in the following ways:

a. counsel was ineffective in advising me to plead guilty when I was ignorant of the cocaine conspiracy;

b. counsel was ineffective in misrepresenting to me that my actions constituted sufficient evidence to establish guilty [sic];

c. counsel was ineffective at sentencing on the ground that I should only be held responsible for the ten kilograms of cocaine that I found in my car.

(4/25/03 Motion at ¶ 6.) Perdomo alleges that his attorney, Mr. Rosenberg, induced him to plead guilty by misrepresenting to him that Perdomo's actions-limited, according to Perdomo, to work on a truck Perdomo did not know contained narcotics and his purchase and repair of vans that, unbeknownst to him, were used to transport the narcotics-sufficed to establish Perdomo's guilt of the conspiracy to distribute more than 500 kilograms of cocaine. Apart from alleging that he received incorrect advice regarding the law of conspiracy, Perdomo also alleges that he lied to the Court (also on counsel's advice) at the plea hearing so that his plea would be accepted. He further contends that counsel's services were sub-standard in that Mr. Rosenberg was unprepared for trial, failed to argue at sentencing that Perdomo was a minor participant in the conspiracy and failed to advise Petitioner that he should plead guilty to the crime of misprision of felony.

In the April 11, 2005 Memorandum, Petitioner expanded his § 2255 motion to argue that he is entitled to re-sentencing under *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

The Court, in its discretion, will adjudicate his claims without an evidentiary hearing. *Gov't of V.I. v. Forte,* 865 F.2d 59, 62 (3d Cir.1989). Third Circuit law instructs that an evidentiary hearing need not be conducted where a § 2255 motion, together with the underlying record, conclusively show that the Petitioner is not entitled to relief. *Id.; see also Solis v. United States,* 252 F.3d 289, 295 (3d Cir.2001) (observing, in connection with an ineffective assistance of counsel claim, that "a defendant would not be entitled to a hearing if his allegations were contradicted conclusively by the record, or if the allegations were patently frivolous."). An evidentiary hearing is not required where the § 2255 motion does not raise an issue of material fact. *Cf. United States v. Essig,* 10 F.3d 968, 976 (3d Cir.1994) (holding that when a § 2255 petition does raise an issue material fact, "the district court must hold a hearing to determine the truth of the allegations."). As the discussion below will make plain, this habeas petition does not present any issue of material of fact, and based on the record, Petitioner's ineffective assistance of counsel claim and claim for relief under *Booker* clearly lack merit.

A. *Ineffective Assistance of Counsel*

***6** The Supreme Court decision in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) sets forth the standard for establishing a claim that a habeas petitioner's Sixth Amendment right of effective assistance of counsel has been violated. The *Strickland* Court held:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. The Third Circuit has stressed relief under § 2255 based on a claim of ineffective assistance of counsel requires that the petitioner satisfy both prongs of the *Strickland* test: a breach of duty and prejudice as a result of that breach. *Nino,* 878 F.2d at 103-04. The petitioner bears the burden of proof to demonstrate ineffective assistance of counsel. *United States v. Baynes,* 622 F.2d 66, 69 (3d Cir.1980).

Here, Perdomo challenges a conviction based on his own plea of guilty to the offense charged. In *Hill v. Lockhart,* 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." Thus, "[u]nder *Hill,* a defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of such a plea by showing that counsel's performance fell beneath the standard articulated in *Strickland* ..." *United States v. Ordaz,* 111 F. App'x 128, 131-132 (3d Cir.2004). To prevail on a *Strickland* claim, the petitioner "must show (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carpenter v. Vaughn,* 296 F.3d 138, 149 (3d Cir.2002).

Petitioner has offered nothing to satisfy either *Strickland* prong: he points to no evidence either that his attorney's representation fell below an objective standard of reasonableness, nor that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. In analyzing an attorney's performance in regards to an ineffective assistance of counsel claim, the Supreme Court directs that a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 698; *George v. Sively,* 254 F.3d 438, 443 (3d Cir.2001) (holding same). In light of this deferential standard, the Third Circuit has cautioned that "it is 'only the rare claim of ineffectiveness of counsel that should succeed.' " *Buehl v. Vaughn,* 166 F.3d (3d Cir.1999) 163, 169 (quoting *United States v. Gray,* 878 F.2d 702, 711 (3d Cir.1989)).

*7 Perdomo's allegations about Mr. Rosenberg's deficient performance at trial are wholly without merit, and indeed, may border on the frivolous. He complains that Mr. Rosenberg engaged in an "ad-lib defense through cross-examination." Indeed, Mr. Rosenberg did engage in witness cross-examination, which weakens rather than supports Perdomo's claims of constitutionally deficient assistance. Petitioner completely fails to identify what acts or omissions of his attorney's trial conduct were not the result of his reasonable professional judgment. *Strickland,* 466 U.S. at 690.

Perdomo's allegations relating to ineffective assistance at the sentencing hearing are similarly futile. The record contradicts Perdomo's assertions that his attorneys should have argued that Perdomo played a minor role in the conspiracy and otherwise attempted to minimize his sentence. His attorneys moved for a downward departure under the Sentencing Guidelines based on minor role. Mr. Rosenberg argued at the sentencing hearing for such a reduction, emphasizing Petitioner's lack of any substantial financial gain. He also argued that Petitioner's activity in the conspiracy was limited to providing a storage area and off-loading point for the drugs, pointing out that Perdomo himself was not engaged in drug sales. Though the argument was ultimately rejected by the sentencing judge, this fact alone does not render the attorneys' conduct constitutionally deficient. Moreover, as a result of his attorneys' efforts and arguments, Perdomo received a two-point Guidelines reduction for acceptance of responsibility.

Finally, Perdomo's claims of ineffective assistance revolving around his allegedly involuntary guilty plea are unsubstantiated. "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *Hill,* 474 U.S. at 56 (quoting *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). Perdomo alleges that his attorney provided him with incorrect legal advice regarding his involvement in the conspiracy. Specifically, Petitioner argues that despite the fact that he was not aware that cocaine shipments were being stored at his garage until some time after he was interviewed by New Jersey State police and had not knowingly joined with the others in a common plan to store and transport cocaine, his attorney advised him that his acts supported the charge that he participated in the conspiracy. Petitioner argues that had he received accurate information from Mr. Rosenberg concerning the application of conspiracy law to Perdomo's actions, he would not have pled guilty to the conspiracy offense. Rather, Petitioner states that his actions may at best have supported his guilt for the crime of misprision of felony [FN4] and suggests that his attorney erred in failing to advise him of this.

> FN4. The crime miprision of felony concerns the concealment and/or failure to report a felony. *Roberts v. United States,* 445 U.S. 552, 557-58, 100 S.Ct. 1358, 63 L.Ed.2d 622(1980). It is governed by 18 U.S.C. § 4, which provides:
>
> > Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

***8** Petitioner's belated and self-serving assertions that he lacked any knowledge of the object of the conspiracy and had not agreed to play a role in accomplishing its goal of distributing narcotics are completely at odds with his sworn statements to the Court. At the plea hearing, he admitted under oath that he knowingly participated in the charged conspiracy for monetary gain. His claims of receiving erroneous and prejudicial advice and of being essentially coerced by his attorney into pleading guilty are baseless. Moreover, Petitioner's suggestion that he could have pleaded guilty to misprision of felony, had his attorney advised him correctly, amount to no more than mere speculation, as there is no evidence that the Government made a misprision plea offer or would even contemplate such a deal. Thus, Petitioner's attempted disavowal of his guilty plea as involuntary fails. He has not demonstrated that his attorney's advice, at the time it was given and based on the facts as established at the plea hearing, fell below the range of competence.

The Supreme Court has been clear that the burden on a convicted defendant challenging his conviction based on ineffective assistance of counsel is a heavy one. *Strickland,* 466 U.S. at 689-90. Perdomo's § 2255 motion falls far short of that burden. His allegations of deficient legal representation by his attorneys are at best unsupported and in fact often contradicted by a record of adequate and competent advocacy on his behalf.

Accordingly, the Court rejects Petitioner's claim that his conviction cannot stand on grounds that his Sixth Amendment right to effective assistance of counsel was violated. Though pro se habeas petitions must be construed liberally, a federal district court can dismiss a habeas corpus petition if it appears from the face of the petition that the petitioner is not entitled to relief. *Siers v. Ryan,* 773 F.2d 37, 45 (3d Cir.1985), *cert. denied,* 490 U.S. 1025, 109 S.Ct. 1758, 104 L.Ed.2d 194 (1989).

B. *Booker Claim*

Petitioner claims that, in the event his conviction withstands the ineffective assistance claim, he is entitled to re-sentencing under *Booker.* In *Booker,* the Supreme Court held that the provision of the Federal Sentencing Act that made the United States

Sentencing Guidelines mandatory, 18 U.S.C. 3553(b)(1), violated the Sixth Amendment and therefore excised that provision. *Booker,* 543 U.S. at 258-59. For the reasons initially articulated by this Court in its January 9, 2007 Opinion, *Booker* does not apply to Petitioner's conviction.

It is settled that *Booker* announced a new rule of criminal procedure. *Lloyd v. United States,* 407 F.3d 608, 613 (3d Cir.2005). A new rule of criminal procedure is not retroactively applicable unless it is a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 612 (quoting *Beard v. Banks,* 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004)). The Third Circuit has held that *Booker* is not retroactively applicable to § 2255 motions where the judgment became final before the *Booker* decision was issued. *Id.* at 615-16 (citing *Teague v. Lane,* 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). In so holding, the Third Circuit reasoned:

> *9 By creating an advisory federal sentencing regime, the *Booker* Court did not announce a new rule of criminal procedure that significantly increases the "certitude" or "accuracy" of the sentencing process. As the Court of Appeals for the Seventh Circuit put it, *Booker* was not a " 'watershed' change that fundamentally improves the accuracy of the criminal process" because defendants' sentences "would be determined in the same way if they were sentenced today; the only change would be the degree of flexibility judges would enjoy in applying the guideline system."

Id. at 615 (quoting *McReynolds v. United States,* 397 F.3d 479, 481 (7th Cir.2005)).

The Supreme Court issued the *Booker* decision on January 12, 2005, two-and-a-half years after Perdomo's judgment of conviction became final on July 29, 2002. *Booker* does not apply. Thus, Petitioner's claim under *Booker* fails as a matter of law.

IV. CERTIFICATE OF APPEALABILITY

This Court must determine whether a certificate of appealability should issue. L.A.R. 22.2. The Court should issue a certificate only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). The Court finds that Perdomo has failed to make a substantial showing that his Sixth Amendment right to the effective assistance of counsel has been denied, and further has not shown that jurists of reason would find debatable that the petition fails to state a valid claim under *Booker.* Therefore, this Court declines to issue a certificate of appealability pursuant to § 2253(c)(2).

V. CONCLUSION

For the foregoing reasons, this Court grants Petitioner's motion for reconsideration of the January 9, 2007 Order dismissing as untimely his petition for habeas corpus relief under § 2255. It accordingly vacates that Order and re-opens this action for consideration of the merits of the § 2255 motion. Reviewing the merits, the Court grants the Government's renewed motion to dismiss Perdomo's 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. A certificate of appealability will not issue. An appropriate form of order will be filed together with this Opinion.

D.N.J.,2009.
Perdomo v. U.S.
Slip Copy, 2009 WL 483887 (D.N.J.)

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EXHIBIT E

H
Only the Westlaw citation is currently available.NOT FOR PUBLICATION

United States District Court,
D. New Jersey.
Re **PORTER**
v.
UNITED STATES.
No. 05-1525 (JAP).

Sept. 12, 2006.

Robert John Haney, Princeton, NJ, for Dawud Porter.

Jonathan D. Levy, Trenton, NJ, for United States of America.

LETTER OPINION

ORIGINAL TO BE FILED WITH THE CLERK OF THE COURT

JOEL A. **PISANO**, District Judge.

***1** Dear Parties,

Currently before the Court is Defendant the United States of America's (the "Government") motion for reconsideration pursuant to Local Civil Rule 7.1(i) and Federal Rule of Civil Procedure 59(e) .[FN1] The Government seeks reconsideration of the Court's July 11, 2006 Order, which, *inter alia,* granted Plaintiff Dawud Porter's 28 U.S.C. § 2255 motion to the extent that it claims ineffective assistance of counsel by reason of failure to file a direct appeal and permitted Mr. Porter to file a direct appeal *nunc pro tunc.* For the reasons set forth below, the Court GRANTS the Government's motion and VACATES the July 11, 2006 Order.

FN1. The Court decides this motion without oral argument as it is permitted to do under Fed.R.Civ.P. 78.

A. Background

Mr. Porter was indicted on January 29, 2002. In May 2002, Mr. Porter and the United States entered into plea agreement. On May 7, 2002, the Court conducted a hearing pursuant to Fed.R.Crim.P. 11 at which Mr. Porter entered a formal plea of guilty to the charge of possession of a firearm and ammunition subsequent to having been convicted of a felony. On October 1, 2002, Mr. Porter was sentenced to 84 months of imprisonment. The judgment of conviction was docketed on October 1, 2002. Mr. Porter's plea agreement does not prevent Mr. Porter from filing an appeal from or collateral attack of his sentence.

Mr. Porter initiated this action on March 18, 2005. On May 31, 2005, in response to a notice and order advising Mr. Porter that he must include all potential claims in a single petition under *U.S. v. Miller,* 197 F.3d 644 (3d Cir.1999), Mr. Porter indicated that he elected to proceed as filed, but also submitted "clarifications" of his motion. Mr. Porter raised the subject ineffective assistance of counsel claim in both the original motion and the May 31, 2005 supplement.

In his submissions, Mr. Porter acknowledged that he did not file a direct appeal from the judgment of conviction. However, Mr. Porter alleged that his counsel was ineffective for failing to file a notice of appeal on Mr. Porter's behalf despite the fact that Mr. Porter "respectfully" and "specifically" requested his attorney to file a direct appeal for him within the requisite time period and to perfect his direct appeal.

As exhibits to the Government's opposition to Mr. Porter's § 2255 motion, the Government submitted correspondence between it and Ousmane Al-Misri, Esq., the attorney who represented Mr. Porter at both the plea hearing and the sentencing. In a letter dated May 17, 2006, the Government asked Mr. Al-Misri to check his files to confirm whether Mr. Porter asked him to file an appeal from Mr. Porter's conviction. In a letter dated May 23, 2006, Mr. Al-Misri responded: "I have reviewed our file relevant to the case. It contains no reference to a request for an appeal by Mr. Porter or any response by my office there to. This comports with my recollection of the case."

Based on the submissions of the parties, the Court found that the recollections of Mr. Porter and Mr. Al-Misri were not in conflict, and that Mr. Porter had demonstrated that his counsel was constitutionally "ineffective" with respect to his failure to have filed a notice of appeal when Mr. Porter instructed him to do so. Further, because the Court concluded that the submissions filed with the Court revealed no contested factual issue to be adjudicated at an evidentiary hearing, the Court did not schedule an evidentiary hearing. Consequently, the Court issued the July 11, 2006 Order that, *inter alia,* granted Mr. Porter's § 2255 motion to the extent that it claims ineffective assistance of counsel by reason of failure to file a direct appeal and enlarged the time in which Mr. Porter would be permitted to file a direct appeal of his conviction and sentence *nunc pro tunc.*

*2 On July 21, 2006, the Government filed the instant motion for reconsideration of the Court's July 11, 2006 Order.

B. Discussion

Local Civil Rule 7.1(i) states that a motion for reconsideration "setting forth concisely the matter or controlling decisions which the party believes the Judge or Magistrate Judge has overlooked" may be filed within ten business days after entry of an order. L.Civ.R. 7.1(i). There are three grounds for granting a motion for reconsideration: (1) an intervening change in controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice. *See, e.g., Carmichael v. Everson,* No. 03-4787, 2004 WL 1587894, at *1 (D.N.J. May 21, 2004); *Brackett v. Ashcroft,* No. Civ. 03-3988, 2003 WL 22303078, at *2 (D.N.J. Oct. 7, 2003). Reconsideration is an extraordinary remedy and should be granted "very sparingly." *See* L.Civ.R. 7.1(i) cmt.6(d); *see also Fellenz v. Lombard Investment Corp.,* Nos. 04-3993, 04-5768, 04-3992, 04-6105, 2005 WL 3104145, at *1 (D.N.J. Oct. 18, 2005) (citing *Maldonado v. Lucca,* 636 F.Supp. 621, 630 (D.N.J.1986)).

The Government's motion is premised on the third ground for reconsideration. The "correct a clear error of law or prevent manifest injustice" ground for reconsideration generally means that the Court overlooked some dispositive factual or legal matter that was presented to it. *See* L.Civ.R. 7.1(i); *see also Fellenz,* 2005 WL 3104145, at *1; *Carmichael v. Everson,* No. 03-4787, 2004 WL 1587894, at *1 (D.N.J. May 21, 2004). The motion must be based on "more than a disagreement with the court's decision" and do more than "recapitulat [e] [ ] the cases and arguments considered by the court before rendering its original decision." *Campbell v. Chase Manhattan Bank,* USA, N.A., No. 02-3849(JWB), 2005 WL 1924669 at *1 (D.N.J. Aug. 10, 2005) (internal quotation marks omitted). "It is improper on a motion for reconsideration to ask the Court to rethink what it has already thought through, whether rightly or wrongly." *S.C. v. Deptford Twp. Bd. of Educ.,* 248 F.Supp.2d 368, 381 (D.N.J.2003). However, "where the court has overlooked matters that, if considered by the court, might reasonably have resulted in a different conclusion, [it will] entertain such a motion." *Campbell,* No. 02-3849(JWB), 2005 WL 1924669 at *1 (internal quotation marks omitted). In analyzing such motions, the Court should consider whether it has "overlooked" some point of law or fact, or "misconstrued" binding precedent. *See Hernandez v. Beeler,* 129 F.Supp.2d 698, 701 (D.N.J.2001).

Page 3 of 3

The Government argues that the Court's July 11, 2006 Order reflects a misunderstanding of the record because there is a factual dispute between Mr. Porter and his former counsel, Mr. Al-Misri, as to whether Mr. Porter ever requested Mr. Al-Misri to file an appeal from his conviction. The Government explains that it is not Mr. Al-Misri's contention that he merely has no recollection as to whether Mr. Porter asked him to file an appeal; rather, Mr. Al-Misri's position is that, contrary to Mr. Porter's claim, Mr. Porter never requested that Mr. Al-Misri file an appeal following the Court's imposition of sentence. In support, the Government submits a Declaration executed by Mr. Al-Misri, in which Mr. Al-Misri attests: "Mr. Porter did not ask me to file any appeal on his behalf from the Court's conviction and sentence. That is the reason I have no recollection as [*sic.*] Mr. Porter making a request of me with regard to the filing of any appeal." Further, Mr. Al-Misri states: "After Mr. Porter was sentenced, Mr. Porter did not express to me any desire to file an appeal." In addition, Mr. Al-Misri sets forth the reasons that he did not address appeal with Mr. Porter after sentencing, and states that "had Mr. Porter asked me to file an appeal, I would have filed the appropriate notice."

***3** In light of Mr. Al-Misri's Declaration clarifying his recollection and position with respect to this matter, the Court finds that the July 11, 2006 Order overlooked a point of fact which would have resulted in a conclusion different from that reached. The submissions previously before the Court, while potentially susceptible to more than one interpretation, failed to demonstrate a difference of recollection between Mr. Al-Misri and Mr. Porter. However, by clarifying his previous statements and unequivocally evidencing that his recollection is that he was not asked to file an appeal, Mr. Al-Misri's Declaration clearly demonstrates the existence of a factual dispute: that the recollections of Mr. Porter and Mr. Al-Misri are at odds. Now having the benefit of this Declaration, the Court concludes that it had overlooked this dispositive factual matter in rendering its decision in the July 11, 2006 Order. Consequently, the Court must grant the Government's motion for reconsideration. Further, in light of foregoing factual dispute, the Court must vacate the July 11, 2006 Order and schedule an evidentiary hearing in accordance with *Solis v. United States,* 252 F.3d 289 (3d Cir.2001), at which the disputed factual issue of whether Mr. Porter ever asked Mr. Al-Misri to file an appeal from his conviction and sentence, and whether Mr. Al-Misri failed to honor such a request may be addressed. Further, pursuant to Rule 8(c) of the Rules Governing Section 2255 cases, the Court must appoint counsel to represent Mr. Porter in connection with this evidentiary hearing. The remaining claims in Mr. Porter's § 2255 motion will be stayed pending the resolution of his claim of ineffective assistance of counsel by reason of failure to file a direct appeal.

C. Conclusion

For the reasons set forth above, the Court GRANTS the Government's motion for reconsideration; VACATES the July 11, 2006 Order; and STAYS the remaining claims in Mr. Porter's § 2255 motion. Further, the Court will schedule an evidentiary hearing in accordance with *Solis v. United States,* 252 F.3d 289 (3d Cir.2001), and will appoint Mr. Porter counsel in connection with this evidentiary hearing pursuant Rule 8(c) of the Rules Governing Section 2255 cases. An appropriate Order accompanies this letter opinion.

D.N.J.,2006.
Porter v. U.S.
Not Reported in F.Supp.2d, 2006 WL 2614221 (D.N.J.)

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EXHIBIT F

C
Only the Westlaw citation is currently available.NOT FOR PUBLICATION

United States District Court,
D. New Jersey.
PFIZER INC. and Warner-Lambert Company, LLC, Plaintiffs,
v.
TEVA PHARMACEUTICALS USA, INC., Ranbaxy Pharmaceuticals, Inc. and Ranbaxy Laboratories Limited, Defendants.
Civ. No. 05-620 (DRD).

Sept. 25, 2007.

Bruce M. Wexler, Paul, Hastings, Janofsky & Walker LLP, New York, NY, Heather Marie Hughes, Melissa L. Klipp, Drinker, Biddle & Reath, LLP, Florham Park, NJ, for Plaintiffs.

Allyn Zissel Lite, Michael E. Patunas, Lite Depalma Greenberg & Rivas, LLC, Newark, NJ, Brooks R. Bruneau, Robert G. Shepherd, Kristine L. Butler, Mathews, Shepherd, McCay, & Bruneau, PA, Princeton, NJ, for Defendants.

OPINION

DICKINSON R. DEBEVOISE, U.S.S.D.J.

*1 In February, 2007, Defendants, Ranbaxy Pharmaceuticals Inc., and Ranbaxy Laboratories, Ltd. (collectively, "Ranbaxy") and Teva Pharmaceuticals, USA ("Teva"), moved pursuant to Fed.R.Civ.P. 56 for partial summary judgment to limit the amount of damages that Plaintiffs, Pfizer and Warner-Lambert (collectively, "Warner-Lambert") can obtain from Ranbaxy and/or Teva. The motion was made on the ground that Warner-Lambert did not comply with the patent marking statute, 35 U.S.C. § 287(a), until the filing of the present suit.

Since 1991 Warner-Lambert, assignee of the '450 patent, has manufactured and sold its quinapril product in the United States under the name Accupril, asserting that it is within the scope of the '450 patent. Warner-Lambert accuses Ranbaxy's quinapril hydrochloride product, which was sold by Teva from December, 2004, until March, 2005, of infringing the '450 patent. Warner-Lambert filed this action on January 25, 2005.

Defendants relied upon 35 U.S.C. § 287(a) which provides that in order to recover damages arising from any infringement prior to commencement of an infringement action, a patentee must demonstrate that it either marked its product or product package with the patent number or other advisory notation or that it provided the alleged infringer with actual notice that the infringing product infringed the patent. Failure to do so bars recovery of any damages arising from any infringing activities that occurred prior to the filing of the complaint.

It is undisputed that Warner-Lambert did not provide defendants with actual notice of Ranbaxy's possible infringement on the '450 patent prior to filing the present suit. Consequently, according to defendants, Warner-Lambert is precluded from obtaining any damages from defendants occurring before the filing of the present suit.

Warner-Lambert pointed to the earlier filed action, *Warner-Lambert Company v. Teva Pharmaceuticals USA, Inc.* (Civ. Action No. 99-922) ("Accupril I"), in which Pfizer accuses Teva's generic version of Pfizer's accupril of infringing the '450 patent. That filing in 1999 constituted actual notice to Teva from Pfizer that Teva's ANDA product infringed the '450 patent. In the present action Pfizer accuses a second Teva generic version of accupril, the one manufactured by Ranbaxy and sold by Teva, of infringing the same patent.

Warner-Lambert, in opposition to Defendants' motion, relied on case law to the effect that when an accused infringer introduces a new product that is insubstantially different from a product for which it earlier received notice of infringement, the earlier notice will suffice under 35 U.S.C. § 282 to provide notice that the later product infringes. Warner-Lambert contended that Defendants' product in this case is insubstantially different from the Teva ANDA product at issue and, therefore, that the filing of Accupril I constituted notice sufficient to satisfy 35 U.S.C. § 287 with respect to defendants' product that is the subject of this case. It contended that the only difference between the Teva ANDA product and the Teva/Ranbaxy product at issue in this case is the use of mcc instead of lactose as the saccharide. Further, Warner-Lambert argued that Pfizer's identification of the '450 patent in its ANDA for accupril provided actual notice to Defendants through the Orange Book.

*2 The court granted Defendants' motion for summary judgment, holding that Warner-Lambert had not given actual notice to Ranbaxy or Teva pursuant to 35 U.S.C. § 287(a) notice.

Warner-Lambert moved for reconsideration contending that the court impermissibly decided a genuine issue of material fact in ruling that the actual notice provided to Teva in the first lawsuit was insufficient to provide notice of infringement with regard to the product subsequently sold by Teva.

Discussion

Motions for reconsideration are governed by Local Rule 7.1(i), which permits a party to seek reconsideration by the court of "the matters or controlling decisions which [it] believes the [court] has overlooked" when it ruled on the original motion. Reconsideration is proper if the movant shows "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [issued its order]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Café v. Quinteros,* 176 F.3d 669, 677 (3d Cir.1999).

Warner-Lambert advances a number of grounds on the basis of which it contends the court committed error in its April 23, 2007, order, e.g., i) the stipulation upon which the court relied by its terms stated that it was for the purpose of *Accupril* I only and could have no effect in the instant action; ii) the stipulation governed the meaning of the term "saccharide" for the purposes of literal infringement and has no relevance to the doctrine of equivalents, which examines whether the claimed and accused products are insubstantially different; iii) the court did not address evidence in the preliminary injunction proceeding and admitted by Teva's expert in *Accupril* I and found elsewhere in the related proceedings that mcc is insubstantially different from lactose; iv) the court overlooked the fact that Claim 16 of the '450 patent requires no function for the saccharide.

Defendants oppose the motion for reconsideration initially on the ground that it does not meet any of the grounds for such a motion under Local Rule 7.1(i). Next, Defendants assert that in its April 23, 2007, opinion the court did not adopt Warner-Lambert's view of the law that actual notice of infringement given with respect to one product can constitute notice of infringement by an insubstantially different product, *e.g., Eastman Kodak Co. v. Agfa-Gevaert N.V.,* 2006 WL 1913368, at *2-3 (W.D.N.Y. July 11, 2006).

In fact, the court did accept Warner-Lambert's view of the law, but found that for notice purposes the similarities of Teva's ANDA product in *Accupril* I and Ranbaxy's ANDA product are not so substantially similar as to cause the filing of the *Accupril* I complaint to become a § 287 notice.

The error the court committed was to make this finding as a matter of law when there was evidence from which a contrary finding could be made. Summary judgment should not have been granted, and the issue should have been left to the jury. The consequences are serious enough to justify correction by means of a Local Rule 7.1(i) motion.

***3** Warner-Lambert's motion for reconsideration will be granted. The court's order granting Defendants' joint motion for partial summary judgment will be vacated, and an order denying their joint motion for summary judgment will be entered.

D.N.J.,2007.
Pfizer Inc. v. Teva Pharmaceuticals USA, Inc.
Not Reported in F.Supp.2d, 2007 WL 2814656 (D.N.J.)

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